

01325

T. Wagner  
Proc. II.

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE:** B-186671

**DATE:** November 23, 1976

**MATTER OF:** WESTPAC Products Company

**DIGEST:**

1. Reduction of prices by one offeror during negotiation does not establish that competitor's price had been improperly disclosed by agency officials.
2. Protester was not prejudiced by request for additional round of best and final offers made in order to rectify possible disclosure of protester's prices since under proper evaluation protester was not low offeror after submission of initial best and final offers.
3. Agency consideration of late proposal modification is proper where modification is received late solely because of Government mishandling.

WESTPAC Products Company has protested the award of a contract to Universal Decking, Inc., by the Naval Regional Procurement Office (NRPO), Long Beach, California, under solicitation No. N00123-76-R-1448. WESTPAC contends that the award to Universal was improper because Navy officials allegedly disclosed WESTPAC's prices during the discussion phase of the procurement, improperly requested an additional round of best and final offers, and promised to award the contract to WESTPAC.

After reviewing WESTPAC's initial offer to supply terrazzo decking and associated grouting and bonding materials for finishing deck surfaces on naval vessels, NRPO officials questioned whether WESTPAC's product had the required epoxy base and was listed on the Qualified Products List (QPL). As a result, WESTPAC was asked to demonstrate its product. It was subsequently determined that WESTPAC's product was on the QPL and the demonstration also satisfied the NRPO officials that WESTPAC's product was acceptable.

During this time, it was discovered that the one other offeror, Universal, had included "technical assistance" in its proposal which was not needed by the Navy. The Navy so informed Universal, which then deleted the service and reduced

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its price accordingly. Because Universal had been given the opportunity to revise its proposal, the Navy reports that the contracting officer requested WESTPAC and Universal to submit best and final offers by May 28.

On May 28, WESTPAC contacted NRFO, objected to the request for best and final offers, and complained that a Naval official had disclosed WESTPAC's prices to Universal. As the contracting officer was unable to immediately contact the official involved in order to check on WESTPAC's charge, he requested that a new round of best and final offers be submitted by June 2 in order " \* \* \* to ameliorate whatever possible disclosure might have been made \* \* \* ." As a result of this last call for best and final offers, Universal was determined to be the low offeror and was awarded the contract.

We have thoroughly considered the record in this case. Although we agree with the contracting officer's statement that this procurement "was not perfectly handled," we find no basis for sustaining the protest.

First of all, the record does not establish that WESTPAC's prices were disclosed to Universal. The Navy reports that its investigation of WESTPAC's allegations confirms that WESTPAC was informed that it was the low offeror, but does not establish that WESTPAC's price or relative position was disclosed to Universal. Nonetheless, WESTPAC argues that the disclosure is evidenced by the fact that Universal reduced its prices sufficiently to become the low offeror. We cannot agree. It is not uncommon for offerors to offer price reductions in the final stages of negotiations, even without changes in the Government's requirements, and we have consistently held that a price reduction by one competitor is not sufficient to indicate that a price leak has occurred. See Security Assistance Forces & Equipment International Inc., B-186428, September 29, 1976, 76-2 CPD 293; Davidson Optronics, Inc., B-179925, February 22, 1974, 74-1 CPD 93; Engineered Systems, Inc., B-184098, March 2, 1976, 76-1 CPD 144.

Secondly, it does not appear that WESTPAC was prejudiced by the Navy's request for an additional round of best and final offers. WESTPAC contends that it submitted the lowest offer received in response to the initial request for best and final offers and therefore the request for an additional round could " \* \* \* do nothing in ameliorating the effects of any disclosure of price \* \* \* ." Normally,

where an offeror's pricing or technical information is improperly disclosed, the contracting agency should make an award on the basis of initial proposals, see RCA Corporation, 53 Comp. Gen. 780 (1974), 74-1 CPD 197, or refuse to entertain further modifications to the proposal of the offeror which received the information. See 50 Comp. Gen. 222 (1970). In a recent case, however, we did not object to a contracting agency's decision to continue to hold discussions with two offerors after one had been erroneously advised of the other's prices where the agency believed it could not award the contract at the prices contained in the initial proposals (which were considered to be unreasonable) and could not drop the firm which had received the information from further competition because such action would leave only one firm in contention for the award. TM Systems, Inc., 55 Comp. Gen. 1066 (1976), 76-1 CPD 299. In that case the agency continued discussions after disclosing each offeror's initial price in order to equalize the competitive positions of both offerors. Here, although the record suggests that the Navy considered TM Systems, Inc. in deciding to call for a second round of best and final offers, the Navy did not reveal Universal's pricing to WESTPAC (because it could not confirm that WESTPAC's prices were disclosed to Universal) but does not otherwise explain how it hoped to rectify the possible disclosure of WESTPAC's prices merely by calling for new offers. It appears to us that the second request for best and finals was premature and, in light of the results of the Navy's investigation, unnecessary.

Nonetheless, we conclude that WESTPAC was not prejudiced by the call for the additional round of best and final offers because our evaluation of the initial best and final offers indicates that Universal and not WESTPAC was the low offeror at that time. WESTPAC's price was \$23,830 less a 5 percent prompt payment discount, for an evaluated total of \$22,738.50. Universal's price was \$22,828 less a 1 percent discount. Although it appears that the Navy did not consider Universal's discount because it was predicated on a 10-day payment period instead of the usual 20-day period, we believe that Armed Services Procurement Regulation (ASPR) § 2-407.3(b) (1975 ed.), which provides that any discount offered shall be deducted from the price "unless the discount offered is for a lesser period than the minimum \* \* \* specified," requires consideration of Universal's offered discount because the solicitation used in this procurement was oral rather than written and did not contain the usual Standard Form 33-A language precluding evaluation

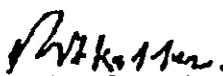
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of less than 20-day discounts. Thus, under a proper evaluation of the initial best and finals, Universal's discounted price of \$22,599.72 would be low.

With respect to WESTPAC's contention that it was promised the contract, it is not clear from the record that in fact any such promise was made. In any event, the contracting officer was authorized to make award only to the lowest priced qualified offeror. Since WESTPAC was not the lowest priced offeror, award could not be made to WESTPAC notwithstanding any promiscory statement on the part of the contracting officer.

Finally, WESTPAC questions the Navy's willingness to accept Universal's second best and final offer, which was received late, when the Navy refused to accept WESTPAC's offer which was also received late. In this regard, the Navy reports that the Universal offer was received and time-stamped by NRPO at 9:54 a.m. on June 2, 1976, well prior to the 2 p.m. closing time, but was not received by the contracting officer until after 2 p.m. because of misrouting. On the other hand, WESTPAC's offer was not received by NRPO until after 4:30 p.m. ASPR §§ 3-506(b) and 7-2002.4 provide that a proposal modification which is received after the time specified for receipt will not be considered unless the late receipt is due solely to mishandling by the Government after receipt at the Government installation. Accordingly, we see no basis for questioning the Navy's acceptance of Universal's late proposal modification or its rejection of WESTPAC's. We do note, however, that even if WESTPAC's second best and final price had been considered by the Navy award would still have been made to Universal since WESTPAC's final price was higher than Universal's final price.

For the foregoing reasons, the protest is denied.

  
Deputy Comptroller General  
of the United States .